Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by	)	WC Docket No. 17-84
Removing Barriers to Infrastructure Investment	)	
	)	WT Docket No. 17-79
Accelerating Wireless Broadband Deployment by	)	
Removing Barriers to Infrastructure Investment	)	

Reply by the City of New York ("the City") to Oppositions to Petitions for Reconsideration of the Third Report and Order and Declaratory Ruling

The City and the Smart Communities and Special Districts Coalition each submitted a Petition for Reconsideration[1] (together, the "Recon Petitions") seeking reconsideration of the Third Report and Order and Declaratory Ruling[2] issued in the above-captioned dockets. The City submits this Reply to the Oppositions[3] ("the Oppositions") to the Recon Petitions.

[1] Petition for Reconsideration of the City of New York, Regarding Sections III. G. and IV. of the Third Report and Order and Declaratory Ruling, *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure,* WT Docket No. 17-79, WC Docket No. 17-84 (Sep. 4, 2018); Petition for Reconsideration of the Smart Communities and Special Districts Coalition, *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure,* WT Docket No. 17-79, WC Docket No. 17-84 (Sep. 4, 2018).

[2] FCC 18-111, adopted August 2, 2018, released August 3, 2018 *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure,* WT Docket No. 17-79, WC Docket No. 17-84, 2018 FCC LEXIS 2038. The Declaratory Ruling portion of FCC 18-111 is hereinafter referred to as "the Ruling".

[3] Oppositions to Petitions for Reconsideration by Verizon, CTIA, NTCA – The Rural Broadband Association, NCTA – The Internet and Television Association, and The USTelecom Association, all filed on Nov. 9, 2018 in *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure,* WT Docket No. 17-79, WC Docket No. 17-84.WT Docket No. 17-79, WC Docket No. 17-84

The Oppositions describe the Recon Petitions as repeating arguments already considered and rejected by the Ruling. However, the Recon Petitions carefully describe and explain errors, omissions and flaws in the findings and logic of the Ruling itself, which by their nature could not have been descriptions and explanations that the Ruling itself considered. The Oppositions refer to the Commission's claims of general authority to *interpret* the Communications Act[4], but the Petitions were primarily concerned not with the scope of the Commission's *interpretation* authority, but rather with the limited scope of the Commission's authority to preempt state and local government decisions and additional aspects of the Ruling which exceed the unambiguous statutory limits on the Commission's substantive authority. References to the scope of the Commission's "interpretive" authority qualify as neither consideration nor rejection of issues that go to clear statutory limits on the Commission's substantive powers.

Thus, for example, the City's Recon Petition pointed to the Ruling's reliance on moratoria that prohibit "deployments" of particular equipment installations as if these were synonymous with the statutory perquisite to preemption of prohibitions on "service". This issue is not a question of interpretation, it is a question of whether the Commission, in reaching its conclusions using an incorrect statutory reference, has exceeded an unambiguous limit on its preemption authority. That is a problem *raised* by the Ruling, not one *resolved* by the Ruling.

The USTA Opposition says: "…the Commission expressly disagreed with assertions that the reclassification of broadband Internet access service affects the validity of its moratoria preemption, noting (consistent with Commission precedent) that it has 'authority over

[4] 47 USC §§151 et seq. Individual sections of the Communications Act are referred to hereinafter by their U.S. Code section number, for example, 47 USC §253 is referred to as "Section 253", etc.

infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis'. Therefore, the Commission should reject these rehashed and unpersuasive arguments about the scope of its authority to preempt moratoria under Section 253(a)." But as the City's Petition pointed out: "…the Ruling [is] problematic not because the Commission lacks 'authority' under other provisions of law over *particular infrastructure items*, but because 253(a) only bars decisions that *prohibit provision of telecommunications service* [emphasis added]." The Commission did not consider and reject this issue in the Ruling, it merely avoided it with an entirely irrelevant reference.

Verizon's Opposition exceeded the Commission's limit on its length.[5] But even if it had been submitted in an acceptable manner, Verizon's new theory of the relationship between Sections 253 and 332(c)(7) was one never presented by the Commission in either the Ruling or its subsequent wireless siting order. And for good reason. It makes no sense, proposes to put the form of a local government action entirely ahead of its substance, and is inconsistent with much of what the Commission claims to have the authority to do in its two wireless siting orders.

Verizon's argument is that Section 332(c)(7)(A) covers only "individual" decisions by local governments while 253 covers general laws and regulations. But Section 332(c)((7)(A) says that nothing in "this chapter" (which includes 253) shall limit "*or affect*" such decisions. So under Verizon's theory, Section 253 cannot be the basis for *affecting* any individual local government decisions that are made regarding wireless siting. Under this interpretation of "decisions", a local

[5] A computer-generated word count indicated over 8,000 words for the text (not including the introductory or conclusory matter), well in excess of the 6,250 word limit permitted under 47 CFR Section 1.49(f)(4), in addition to the submission as printed exceeding the page limit.

government law, regulation or other legal requirement that *affects* the way subsequent individual local government decisions about wireless siting are made cannot be preempted by Section 253 to the extent it has any such effect. That result would hardly be consistent with the Commission's recent wireless orders or Verizon's apparent preference for how such orders should be treated by the courts.

Verizon's interpretation would also seem to compel a much narrower view of Section 332(c)(7)(B)(i) than the Commission is relying on in its recent orders. Section 332(c)(7)(B)(i) uses the same "regulatory" language, as opposed to "individual" (as Verizon would have it) decision language, that Verizon ascribes to Section 253. Which would then mean that individual decisions by local governments, whether with respect to zoning or with respect to use or disposition of public property, are never restricted by prohibition-of-service or discrimination provisions, regardless of whether they are in Section 253 or Section 332.

A local government could choose to handle requests for wireless facilities locations on an individual decision basis, evaluating each one by one on its own separate merits on a number of factors, including how much rent should be charged for that particular location[6], what size and esthetic constraints fit each particular location, etc.. Such decisions would be unconstrained by Section 253 or Section 332 under Verizon's theory. The City to date has chosen to act on locations with more general rules on these matters, in the hope such approach would help street locations be used more effectively for wireless purposes. But if the Commission is going to try, via Sections

[6] Indeed, perhaps a local government could choose to auction a particular site off to the highest bidder, following the Commission's frequently used model for the public right-of-way known as the electromagnetic spectrum.

253 and 332, to constrain the long-standing ability to defend the interests of its residents, businesses and visitors, and if acting on site requests by individual decision will restore that ability as Verizon theory suggests, the City, or indeed any other local government, may well choose to pursue that approach instead.

The above points bring home the clear conclusion that Verizon's theory would absurdly place form entirely over substance. A local government that chooses to act on wireless siting applications on an individual, decision-by-decision basis would be essentially unconstrained in the substance of its decision-making by Section 253 or 332(c)(7)(B)(i). But if a local government instead chooses to do so in the form of a regulation or law, it becomes subject to Sections 253 and 332 merely by the nature of the form in which it has chosen to act. Such result cannot possibly be what Congress intended.

Far more plausible is what the City has contended: Section 332 covers wireless siting; Section 253, barred from affecting any and all wireless siting matters by 332(c)(7)(A), covers *wireline* siting only; and 332(c)(7)(B)(i)'s regulatory language limits the scope of that subsection to decisions that affect private property, not public property[7]. The form of a local government's action is thus irrelevant, with substance properly being the only relevant factor. In short, far from supporting opposition to a petition for reconsideration, Verizon's new theory ends up supporting

[7] Regardless of whether it is a property on a street or not, any wireless siting decision regarding public property is by its nature, whether made case-by-case or in groups, that of a property owner regarding its own property, not a regulatory (i.e., an exercise of zoning or land use oversight regarding proposed installations on a private property) decision.

reconsideration, as the Commission needs to swiftly repudiate this approach or risk being tagged with it.

The Commission might, of course, choose to deny the Recon Petitions. Or the Commission might choose merely to fail to swiftly respond[8] to the Recon Petitions. Either way, the judiciary will quickly reject such a failure by the Commission to deal with the unambiguous limits on its authority. Instead, the Commission should act in the public interest by reconsidering its decision in the form of an immediate reversal of the Ruling.

Respectfully submitted,

The City of New York

s/_____

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[8] As swiftly, for example, as the Commission believes local managers of street property should be required to respond to every industry demand for installing refrigerator-sized equipment, rent-free, potentially spread in vast numbers across every local road and street in America.

CERTIFICATE OF SERVICE

I, Bruce Regal, hereby certify that on this 19th day of November, 2018, a copy of the foregoing "Reply by the City of New York ("the City") to Oppositions to Petitions for Reconsideration of the Third Report and Order and Declaratory Ruling" was served by first-class U.S. mail, postage prepaid, on the following:

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/s/ Bruce Regal

Bruce Regal
November 19, 2018